Nos. 108, 109, 110, 125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the District of Connecticut

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BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The National Industrial Traffic League (hereinafter referred to as the League) is a nationwide organization of shippers, both large and small, who utilize all forms of transportation including railroads, motor carriers, water carriers and air carriers. In addition to individual shippers the League membership includes Chambers of Commerce, Boards of Trade and similar commercial organizations which in turn have individ-

ual shipper members. The more than 1600 members of the League are drawn from all parts of the United States and include practically every line of industrial and commercial activity. The League is strictly a shipper organization. The League is not oriented toward any particular mode of transportation and its members use all modes.

Since being founded in 1907 the League on behalf of its membership has participated in many proceedings where issues of national transportation importance were involved before the courts, the Interstate Commerce Commission and other agencies in addition to presenting the League's views to legislative bodies.

By its constitution the League is dedicated to the promotion of sound conditions in transportation. Since the League represents those who are directly and individually engaged in the shipment and receipt of commodities by all forms of transportation, it represents that portion of the public with the most direct interest in a sound transportation system, the payers of the transportation charges in this country. Representing the shipping public most directly concerned with transportation, the League is, to a substantial extent, the voice of the consuming public in matters dealing with transportation.

The League believes there should be the greatest degree of responsibility upon, and freedom of, carrier management in providing the public with the transportation service which it needs. Regulation should be limited to that reasonably necessary in the public interest and should not encroach upon the proper sphere of managerial discretion and responsibility either in the field of traffic or actual physical operation.

It is the general position of the League that support should be given to proposals by carrier managements of new methods or techniques of rate-making which lend promise of improvement of the revenues, and of increasing or preserving the traffic of the carriers proposing them, with apparent benefits to the shipping public without creating destructive competition. While the League does not condone what could properly be described as rate wars and truly destructive competition, it believes that encouragement, to the greatest extent possible, of free and fair competition in transportation is in the public interest and is consonant with the applicable statutes and legislative intention of Congress as expressed in Section 15a(3) of the Interstate Commerce Act.[1]

QUESTION PRESENTED

The question presented is whether the Interstate Commerce Commission can order the cancellation of otherwise lawful reduced rail rates merely to protect and preserve the traffic to a competing carrier by a different mode without specific findings adequately supported by substantial evidence the protected carrier possesses the inherent advantage of providing the low-cost mode of transportation.

ARGUMENT

The court below properly construed and applied the statutory language in Section 15a(3) of the Interstate Commerce Act in the light of the legislative history when it held that the Interstate Commerce Commission can not prevent a carrier from reducing its rates merely to preserve and protect the traffic of a competi-

[1] 49 U.S.C. 15a(3).

ing carrier where the Commission has not found, based on substantial evidence of record, that the carrier being protected possesses the inherent advantage of being the low cost mode of transportation and that the national defense requires the protected carrier's continued operation. The mere fact that the reduced rail TOFC rates could be expected to divert substantial traffic from the competing water carrier operation and thereby threaten its continued operations does not constitute an unlawful and destructive competitive practice under the applicable statutes. The Court below has properly decided that when the Commission sought to rely on the adverse effect the reduced rates would have on competition as justification for ordering the reduced rail TOFC rates cancelled, the Commission was "plainly holding up railroad rates 'to protect the traffic of another mode' ", and this was "contrary to the specific prohibition of the 1958 amendment." (R. 247).

A. The Court Below Has Given Proper Effect to the Congressional Intention in Enacting Section 15a(3)

The salient fact that impresses itself after a review of the legislative history of Section 15a(3) is that its enactment was intended to encourage carrier competition. This congressional intention is clearly enunciated in the various committee reports and the floor debate of which the following excerpt is but one example:

> "The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee *is designed to encourage competition in transportation* by allowing each form of transportation subject to the Interstate Commerce Act

> full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies." (Emphasis added)

S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958)

Congress presumably was not encouraging only *ineffective* competition. If the railroads were effectively to compete for the traffic involved in this proceeding it would mean that they must offer services at prices that will attract business. To say, as the Commission would have the Court say, that as soon as the competition is effective in attracting substantial traffic which another competitor needs to continue its current level of operations, the competition becomes destructive and therefore unlawful, is to make a mockery of the Congressional intent to encourage competition.

In the instant case the water carriers, following World War II, had developed their non-break-bulk Sea-Land operations which constituted an innovation and improvement in service over their previous break-bulk operation. The railroads sought only to compete effectively with this new Sea-Land service. The railroads also offered an improved service under their TOFC rates, but those rates were not published at levels lower than the Sea-Land rates. They were published at a parity. Any ability to attract substantial

traffic would be attributable to a better service being offered at a comparable price.

This was competition in ratemaking and transportation services to the benefit of the public as intended by Congress. This objective of the amendment was expressed by the Subcommittee On Surface Transportation of the Senate Committee On Interstate and Foreign Commerce in the following language which was later stressed by the entire Committee when quoted for emphasis in S. Rept. No. 1647, 85th Cong., 2d Sess. p. 3 (1958):

> "The subcommittee anticipates that the broad effect of this amendment will be *to encourage competition* between the different modes of transportation *to the benefit of the shipping public.*" (Emphasis added)

In submitting the conference report for adoption by the Senate, Senator Smathers, Chairman of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce expressed the views of Congress regarding the amendment to the rule of ratemaking:

> "Mr. President, with respect to competitive ratemaking, the bills of both the Senate and the House had the same provisions. That was the provision which originated in the Senate, and the House included it in its bill. We did not change that in any respect whatever. Of course, we are very proud of the fact that not only the railroads but also the truckers, the water carriers, and everybody else agreed the rule of ratemaking could be changed without detriment to any one of them but that by putting the new criteria for ratemaking in the bill we are going to eliminate some of the pa-

> ternalism which has heretofore existed in the minds of the Interstate Commerce Commission. *I think we will breathe into our whole system of transportation some new competition, which of course is needed, because the public and the consumer will benefit therefrom.*" (Emphasis added)

104 Cong. Rec. 15528 (1958).

By ordering the reduced rail TOFC rates cancelled and requiring a differential to be maintained on the rail rates at levels above the corresponding Sea-land rates, the Commission was simultaneously not only protecting and preserving the traffic to Sea-land but was precluding and outlawing any *effective* competition by the railroads. The railroads were to be prevented from effectively competing so there would be no likelihood the railroads would attract substantial traffic under their new rates and services. This was to be done by the Commission without any findings, supported by substantial evidence, that the water carriers should be protected because they possessed the inherent advantage of being the low cost carrier and that the maintenance of their present level of operations was somehow required by the national defense. The Commission was, in fact, attempting to act as the "giant handicapper".[2]

The role assumed by the Commission of imposing differentials to assure the continued operations of carriers not found to have any inherent advantage to be protected in the interest of the national defense is directly contrary to the "new competition" mandated by Section 15a(3). Such a role is precisely the type of "paternalism" intended to be eliminated by the

[2] Brief of United States p. 38.

1958 amendment to the rule of ratemaking.[3] Likewise, the Commission decision would, contrary to Congressional intention,[4] directly prevent the forces of a new and free competition from working to the benefit of the shipping public in the form of new and improved services at reduced transportation charges.

The decision of the court below, on the issues before it, is consistent with and gives effect to the statutory language and the legislative intention behind the enactment of Section 15a(3) by reversing the Commission's attempt to protect and preserve a carrier's present level of operations from any effective competition. The decision of the lower court should be affirmed.

B. The Commission Order and Decision Should be Judged in Accordance With Its Expressed Findings

It is clear from the Commission's decision that the Commission was not attempting to protect any "inherent advantage of the water carrier as the low cost mode of transportation." The Commission admitted that, after a detailed analysis of the record before it, "we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue." (R. 36-37) It is unwarranted speculation to guess how and on what grounds the Commission might act in a case where it is able and does determine what

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[3] *Supra* pp. 6-7; 104 Cong. Rec. 15528 (1958).

[4] In addition to the previously quoted statement of Senator Smathers upon offering the conference report for the approval of the Senate, *supra* pp. 6-7, 104 Cong. Rec. 15528 (1958), there were statements in the legislative history evidencing the intent of Congress that Section 15a (3) was to encourage free competition for the benefit of the shipping public. Cf. 104 Cong. Rec. 12524, 12531.

mode does possess the inherent advantage of low-costs. On the present record which was before the court below there was no issue as to what mode possessed the inherent advantage of low costs. The Commission had clearly found it was inable to determine where the low-cost advantage lay. *A fortiori*, there was no issue as to whether the Commission had properly determined what is the proper method to be used in resolving which mode possesses the inherent advantage of low-costs.

Thus, since the issue was not properly before the court, the lower court's discussion of the use of so-called "fully distributed costs" to determine what is the low-cost mode is most properly designated *obiter dictum*. It is respectfully submitted that the proper method to be used by the Interstate Commerce Commission in resolving what mode possesses the inherent advantage of low cost is a matter to be decided, in the first instance, by the Commission on a record properly presenting adequate evidence on that issue.

It might be noted in passing that there is considerable dispute among economists and transportation experts as to the proper method for determining what is the low cost mode of transportation in a given case and as to the objective validity of so-called "fully distributed costs" and other criteria.[5] The Commission presently has before it a proposed rulemaking proceeding Docket 34013, *Rules To Govern The Assembling And*

[5] Cf. "The Role of Cost In The Minimum Pricing of Railroad Services," Baumol et al., 35 U. Chi. Bus. J. 357 (1962); "Arbitrary Formulas in Regulatory Proceedings," E.R. Jelsma, 12 Fed. Accountant 37 (1962). In its dictum the court below referred to "fully-distributed costs" as "a largely arbitrary estimate." (R. 253)

Presenting of Cost Evidence, in which the views of many experts and parties will be expressed as to the use and validity of many transportation costing methods. Sound judicial procedure requires that further discussion of the proper methods to be employed to determine what is the low-cost mode of transportation be left for a proceeding properly raising that issue.

The rule was stated by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

After reviewing the evidence relating to the comparative costs of the different modes the Commission in its decision made it clear that the decision was not based upon a determination of which was the low cost mode. (R. 36-37.) Therefore, the Commission's discussion of so-called "fully distributed" and other costs did not form the grounds upon which its decision was based. Likewise, the discussion of such costs by the lower court was not related to the grounds upon which the Commission had acted. Since the discussion by the court below with respect to such costs did not relate to the grounds upon which the administrative action was based, that discussion is not in issue here as a part of the grounds upon which this Court is to judge the administrative order.

CONCLUSION

For the reasons stated above, the judgment of the district court setting aside and vacating the report and order of the Commission should be affirmed.

Respectfully submitted,

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